

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* KIM PALLISTER and DEAN P. MACRI

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Appeal 2007-4084  
Application 10/262,353  
Technology Center 2100

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Decided: April 24, 2008

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*Before* JAMES D. THOMAS, ALLEN R. MACDONALD,  
and THU A. DANG, *Administrative Patent Judges*.

DANG, *Administrative Patent Judge*.

DECISION ON APPEAL

I. STATEMENT OF CASE

Appellants appeal the Examiner's final rejection of claims 1-23 under 35 U.S.C. § 134. We have jurisdiction under 35 U.S.C. § 6(b).

#### A. INVENTION

According to Appellants, the invention is a method and an apparatus for identifying a processing configuration, identifying a piece of application software, and using processor affinity information from an affinity database to determine which processor(s) or duplicated component(s) of a processor to use in executing the piece of application software (Spec., Abstract).

#### B. ILLUSTRATIVE CLAIM

Claim 1 is exemplary and is reproduced below:

1. A method comprising:

identifying a processing configuration of a computer system;

starting the execution of a piece of application software; and

in response to starting the execution of the piece of application software,

identifying the piece of application software;

searching for an entry corresponding to the piece of application software in an affinity database that comprises a plurality of entries, wherein each entry identifies a manner of allocating execution of a corresponding piece of application software among processing resources;

using the identified processing configuration and information from the entry corresponding to the piece of application software to select one or more processing resources of the computer system for executing the identified piece of application software; and

Appeal 2007-4084  
Application 10/262,353

causing the selected one or more processing resources to execute the identified piece of application software.

### C. REJECTIONS

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Dutta US 2003/0037030 A1 Feb. 20, 2003  
(filed Aug. 16, 2001)

Claims 1-23 stand rejected under 35 U.S.C. § 102(e) over the teachings of Dutta.

We affirm.

## II. ISSUES

The issues are whether Appellants have shown that the Examiner erred in finding that claims 1-23 are unpatentable under 35 U.S.C. § 102(e) over the teachings of Dutta.

### III. FINDINGS OF FACT

The following Findings of Fact (FF) are shown by a preponderance of the evidence.

## *Appellants' Invention*

1. In an embodiment of Appellants' invention, computer system 100 begins execution of affinity software 160 to identify application

software 150, and to then search affinity database 169 to find an entry corresponding to the identity of application software 150. Computer system 100 is caused by affinity software 160 to use the information within that entry to determine the manner in which application software 150 should be executed within computer system 100 given the processing configuration created by the combination of processors 110 and 115. The information within that entry is used to determine whether application software 150 should be executed by processor 100, processor 115 or both processors (Spec. 5, para. [0018]).

*Dutta*

2. Dutta discloses a software database 10 which contains versions of software programs, wherein each software type has a directory to facilitate location and access of a particular software program. A directory for each category would include directories for operating system programs 12a, utility programs 12b and application programs 12c. Each directory contains records 13 for each version of software in the directory. In addition, programs are created in various computer languages that enable the software program to communicate with the computer hardware that will execute the program (pg. 3, para. [0029]; Fig. 2).
3. A database record 13 contains an identifier for each program stored in the database, wherein the record contains an identifier field 14, a program description field 15, and a pointer field 16 that will enable a

- program to be linked to other programs. In an embodiment, the software database 10 could contain many versions of the UNIX operating systems, wherein each version would be a different computer software program (pg. 3, para. [0030]).
4. The database could be contained in a software server device 17. This server contains the architecture that controls the maintenance access, retrieval and execution of the software programs in the database. A central processing unit 18 executes software programs retrieved from the database. Operating systems programs 19 in the server control the access the retrieval of and access to the software programs contained in the database. A memory 20 stores these server system programs. The system programs 19 can call emulation and simulation programs 21 during the execution of a retrieved software program when particular other software programs or hardware needed to execute the retrieved software program does not exist in the system (pg. 3, para. [0031]; Fig. 1).
  5. A user establishes communication with the facility server device 17 through an interface device such as a terminal 23. After establishing this connection, the user subjects a request 51 to the facility server. This request will contain information about the particular software programs that are of interest to the user submitting the request. The facility server will process the request at the server 51. This location can be the same location as the database, since the facility server 17

and the software database 10 can be located in the same machine. The request-processing step involves retrieving the software requested by the user, identifying the purpose for the request of the software and determining additional resources needed to enable the user to accomplish the identified purpose for the request. The software retrieval task involves locating the requested software in the database and retrieving that software to server. The user may want to download the software to a remote machine for use at a later time. When a user desires to execute a program, there needs to be an appropriate computing environment to execute the program. Some software versions may run on processors that are also not currently in use or currently available. In these cases, simulator and emulator programs provide the computing environment that can execute the requested software program (pg. 4, para. [0035]; Figs. 1 and 6).

6. In an embodiment, the user would identify/select the software program version to execute. The facility server will then create the computing environment necessary to execute the selected program. This step involves determining the resources needed to execute the program (pg. 4, para. [0039]; Fig. 7).

#### IV. PRINCIPLES OF LAW

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior

art reference." *Verdegaal Bros., Inc. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987).

The *claims* measure the invention. *See SRI Int'l v. Matsushita Elec. Corp., of America*, 775 F.2d 1107, 1121 (Fed. Cir. 1985) (en banc). "[T]he PTO gives claims their 'broadest reasonable interpretation.'" *In re Bigio*, 381 F.3d 1320, 1324 (Fed. Cir. 2004) (quoting *In re Hyatt*, 211 F.3d 1367, 1372 (Fed. Cir. 2000)). "Moreover, limitations are not to be read into the claims from the specification." *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993) (citing *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989)). Our reviewing court has repeatedly warned against confining the claims to specific embodiments described in the specification. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1323 (Fed. Cir. 2005) (en banc). During prosecution before the USPTO, claims are to be given their broadest reasonable interpretation, and the scope of a claim cannot be narrowed by reading disclosed limitations into the claim. *See In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997); *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989); *In re Prater*, 415 F.2d 1393, 1404-05 (CCPA 1969).

"[T]he words of a claim 'are generally given their ordinary and customary meaning.'" *Phillips v. AWH Corp.*, 415 F.3d at 1312 (Fed. Cir. 2005) (en banc) (internal citations omitted). "[T]he ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, *i.e.*, as of the effective filing date of the patent application." *Id.* at 1313.

In the absence of separate arguments with respect to claims subject to the same rejection, those claims stand or fall with the claim for which an argument was made. *See In re Young*, 927 F.2d 588, 590 (Fed. Cir. 1991). *See also* 37 C.F.R. § 41.37(c)(1)(vii)(2004).

## V. ANALYSIS

### *Claims 1-4, 13, and 14*

As to claim 1, Appellants argue that Dutta does not disclose "searching for an entry..., wherein **each entry identifies a manner of allocating execution of a corresponding piece of application software among the processing resources; using** the identified processing configuration and **information from the entry** corresponding to the piece of application software to **select one or more processing resources of the computer system for executing the identified piece of application software**" (App. Br. 5).

Appellants argue that the purpose of Dutta's database "is to archive the software programs... but not to identify how to allocate execution of a

software program among processing resources,” and that, though the software database 10 of Dutta contains a plurality of directories, and each directory contains a plurality of entries, “Dutta does not provide details on the identifier field and program description field” in each entry (App. Br. 6).

We disagree. The Examiner’s position as to Dutta disclosing the claimed elements on appeal beginning at page 4 of the Answer and the Examiner’s corresponding responsive arguments beginning at page 9 of the Answer meet all of the limitations required by independent claim 1 on appeal.

The claimed limitation “a manner of allocating execution” cannot be confined to a specific embodiment. Appellants’ claims simply do not place any limitation on what the “manner” is to be, to represent, or to mean, other than that the manner allocates execution among the processing resources. Appellants’ argument that Dutta’s database differs from Appellants’ affinity database because it also archives the software programs is not commensurate with the invention that is claimed.

We construe “a manner of allocating execution” in a database entry to be information that is used to determine which resource is needed to execute the software. Appellants’ own disclosure sets forth that information within an entry of affinity database 169 is used to determine whether application software 150 should be executed by processor 100, processor 115 or both processors (FF 1).

Dutta discloses a software database 10 which contains versions of software programs, wherein the programs are created in various computer languages that enable a software program to communicate with the computer hardware that will execute the program, and wherein each software type has a directory and each directory contains records 13 with an identifier for each program stored in the database (FF 2-3). Software server device 17 containing the database controls the maintenance access, retrieval and execution of the software programs in the database, wherein upon request by a user, the server retrieves the software requested by the user, identifies the purpose for the request of the software and determine resources needed to enable the user to accomplish the identified purpose for the request (FF 4-5). In an embodiment, the server creates a computing environment necessary to execute the selected program which involves determining the resources needed to execute the program (FF 6). The Examiner found that “Since software database element 10 and server element 17 are integral part of the ‘machine’ or ‘computer system’, Dutta teaches how to use the information from the database entry to select processing resources of the computer system to execute the retrieved program” (Answer 12-13).

We generally agree with the Examiner that Dutta discloses the claimed features. We find the information obtained from the record of the retrieved software program that is used by the software server device to determine the resources needed, as disclosed by Dutta, to be information that sets forth the claimed “manner of allocating execution” of the software

program. That is, we find that Dutta teaches allocating execution of the software program based on the software program identification obtained from the database, similar to Appellants' own teaching of allocating execution to various processors (FF 1). Though Dutta identifies the purpose of the request from the user, Dutta also uses the information in the database which identifies the software program, including the particular version, to determine the resources needed to execute the particular version of the software program.

The Appellants also argue that "Dutta does not teach how to use the information from the database entry to select processing resources" and that "it is the server, but not the software applications maintained in the 'database', to interact with the user" (App. Br. 7-8). However, Appellants' argument is not commensurate with the claimed invention, since the claims do not recite any limitation of "how to use" the information or "to interact with the user." Similarly, Appellants' argument that "the database is not the server which executes the software programs" (App. Br. 9) also is not commensurate with the claimed invention. Dutta discloses that database information is used to determine the resource required for execution (FF 2-6).

As to the other recited elements of claim 1, Appellants provide no argument to dispute that the Examiner has correctly shown where all these claimed elements appear in the prior art. Accordingly, we find that the

Appeal 2007-4084  
Application 10/262,353

Appellants have not shown that the Examiner erred in rejecting claim 1 as anticipated by Dutta.

Appellants do not provide a separate argument for claims 2-4, 13, and 14, and thus, claims 2-4, 13, and 14 fall with claim 1.

For at least the above reasons, we conclude that Appellants have not shown that the Examiner erred in rejecting claims 1-4, 13, and 14 under 35 U.S.C. § 102(e).

*Claims 5-8, 15, and 16*

As to claim 5, Appellants repeat the argument that “Dutta is silent on use the information from the entry in the database to select a processor” (App. Br. 11). As discussed above with respect to claim 1, we find the information obtained from the record of the retrieved software program that is used by the software server device to determine the resources needed, as disclosed by Dutta, to be information used to select the resource. As to the other recited elements of claim 5, Appellants provide no argument to dispute that the Examiner has correctly shown where all these claimed elements appear in Dutta. Thus, we deem those arguments waived. *See* 37 C.F.R. § 41.37(c)(1)(vii) (2004).

Accordingly, we conclude that Appellants have not shown that the Examiner erred in rejecting claims 5 and claims 6-8, 15, and 16 depending therefrom under 35 U.S.C. § 102(e).

*Claims 9-12, 17, and 18*

As to claims 9-12, 17, and 18, Appellants do not provide a separate argument for the claim 9 and claims 10-12, 17 and 18 depending therefrom. Thus, claims 9-12, 17 and 18 fall with claim 1. Accordingly, we find that the Appellants have not shown that the Examiner erred in rejecting claims 9-12, 17, and 18 as unpatentable over Dutta under 35 U.S.C. § 102(e).

*Claims 19-23*

As to claim 19, Appellants repeat the argument that “Dutta does not teach the software database includes an entry to specify how to allocate execution of application software” (App. Br. 13). As discussed above with respect to claim 1, we find the information obtained from the record of the retrieved software program that is used by the software server device to determine the resources needed, as disclosed by Dutta, to be information that is used to specify how to allocate execution of the software program. As to the other recited elements of claim 19, Appellants provide no argument to dispute that the Examiner has correctly shown where all these claimed elements appear in Dutta. Thus, we deem those arguments waived. *See* 37 C.F.R. § 41.37(c)(1)(vii) (2004).

Accordingly, we conclude that Appellants have not shown that the Examiner erred in rejecting claim 19 and claims 20-23 depending therefrom under 35 U.S.C. § 102(e).

Appeal 2007-4084  
Application 10/262,353

#### CONCLUSIONS OF LAW

- (1) Appellants have not shown that the Examiner erred in finding that claims 1-23 are unpatentable over the teachings of Dutta.
- (2) Claims 1-23 are not patentable.

#### DECISION

The Examiner's rejection of claims 1-23 under 35 U.S.C. §102(e) is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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